Supreme Court, U.S.
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No. 01-287

IN THE
SUPREME COURT OF THE UNITED STATES

EMILY ADLER, et al.,

Petitioners,

vs.

DUVAL COUNTY SCHOOL BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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REPLY

The briefs in opposition, in one way or another, concede that the issue presented in the Petition for Writ of Certiorari is important and has spawned substantial litigation yielding a patchwork of results in the circuits. The very division of the *en banc* Eleventh Circuit in this case speaks to both the importance and interpretive divisions in the courts of appeals. Furthermore, the bulk of the arguments made in the briefs in opposition are directed at the asserted distinguishability of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), from this case and defense of the Eleventh Circuit's judgment, matters more properly considered in review on the merits, as opposed to this Court's threshold determination of whether to grant review. The apparent conflicts among the courts of appeals and of the judgment below with this Court's decision in *Santa Fe* warrants the Court's review in this case.

With respect to the record, the respondents significantly do not take issue with the fact that the "Graduation Prayers" policy has resulted in at least 62 messages reflected in programs pre-printed by the respondents, 58 of which messages were entitled "invocation" or "Benediction," or were delivered by a student "chaplain," or both, between 1994 and 1998. The record demonstrates, by the very use of these terms specifically descriptive of religious expression and the title of a religious officer in these pre-printed programs (tabulated at App. 262a-266a), that respondents are aware in advance of the intended religious nature of the speech resulting from the policy. *See Santa Fe*, 530 U.S. at 306-07 & n.19 ("invocation" is "term that primarily describes an appeal for divine assistance"). Respondents, therefore, are no more disentangled from the religious messages resulting from the policy than was the Santa Fe Independent School District.

The policy itself provides that the "senior class as a whole" decides the "messenger," App. 267a-268a, and the respondents can identify no manner in which this determination is made other than by majority or plurality

vote.[1] In fact, even in the face of litigation over the policy since 1993, the record includes, for example, a ballot for one high school's class of 1998, which listed candidates for class "chaplain" and then posed two questions: "PRAYER AT GRADUATION: 1. Yes. 2. No," and "DO YOU WANT THE CLASS CHAPLAIN TO READ THE PRAYER?" Exh. 51 at 7. The record also reflects other plebiscites specifically on the question of prayer at graduations. App. 127a & n.15; *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1102 & n.15 (11th Cir. 2000) *(en banc) (Adler IV)* (Kravitch, J., dissenting).

Respondents' knowledge that their "Graduation Prayers" policy has and will result precisely in "graduation prayers," as established by the record, renders the facts of this case similar to *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 1228, 149 L.Ed.2d 138 (2001). In light of the record, the Eleventh Circuit's judgment in this case conflicts with the Ninth Circuit's decision in *Cole*.[2] Squarely contrary to the judgment of the Eleventh Circuit in this case, the Ninth Circuit in *Cole* concluded that "allowing the students to engage in sectarian prayer and proselytizing as part of the graduation ceremony would amount to government sponsorship of, and coercion to participate in, particular religious practices." *Cole*, 228 F.3d at 1104. The putative intervenors acknowledge the inconsistency of *Cole* with the judgment of the Eleventh Circuit in this case.

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[1] Superintendent Zenke's deposition testimony was accurately quoted at page 3 of the Petition, although the Petition mistakenly cited to pages 10-11, rather than the correct citation to page 9, of his deposition.

[2] The putative "respondents-intervenors," who would appear simply to be *amici* in this Court, characterize *Cole* as "merely an aberration." However, *Cole* is the law of the Ninth Circuit because that court's two previous decisions most closely on point were subsequently vacated. *See Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995); *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated*, 177 F.3d 789 (9th Cir. 1999) *(en banc)*.

Furthermore, both the Respondents and the putative intervenors conspicuously ignore the circuit conflict resulting from the Eleventh Circuit's explicit rejection in this case of the reasoning and decision of the Fifth Circuit on the issue of prayer at graduation in *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 819 (5th Cir. 1999), which holding this Court declined to review. *See* App. 70a-72a, n.7; *Adler IV*, 206 F.3d at 1079, n.7.

Arguments in opposition to the petition also seek to mischaracterize this case as one involving free speech or equal access. However, no court other than the district court in this case has ever actually held that a public high school graduation exercise is a public forum. *See* Petition at 11. The issue presented relates to a state policy regarding prayer at a highly controlled school function on school-controlled property utilizing a school microphone, *see Lee v. Weisman*, 505 U.S. 577, 592-94, 599 (1992), not an issue related to mere use of school facilities outside of the times for school functions. The graduation ceremony microphone is not equally open to all.

The record and the face of the policy belie Respondents' contention that the "Graduation Prayers" policy is all about free speech and allowing students to direct their own graduation ceremonies.

> The policy is not entitled "Student Messages" or "Student Participation in Graduation," but "Graduation Prayers." There is nothing about a general student message or student participation that would cause the school board to dictate that it come at the beginning or end of the ceremony; that is, however, exactly when prayer traditionally occurs in a ceremony. And the board's mandate that the student "message" be no longer than two minutes comports nicely with the length of a good, short prayer. The memorandum that became the board's policy refers repeatedly not to free speech or democratic participation cases but to a school prayer decision.

App. 47a, *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1350 (11th Cir. 2001) *(Adler V)* (Carnes, J., dissenting).

Additionally, the putative intervenors also argue that the petitioners could not obtain any remedy that would comport with the Constitution. On the contrary, however, petitioners seek, among other things, to enjoin respondents' "Graduation Prayers" policy, which creates actual and perceived state sponsorship and endorsement of religion. Furthermore, the precise contours of an injunctive remedy are more properly developed during review on the merits or in further proceedings below.

The facts of this case are established in the record relating to the graduation ceremonies that occurred in 1993 by judicial notice of the *Adler I* record, as well as the verified complaint pleading facts relating to graduation ceremonies between 1993 and 1997; authenticated copies of dozens of graduation programs and other documents from the years 1994 to 1998; and the affidavit of Karen Adler. *See* App. 135a-137a & nn. 24-31; *Adler IV*, 206 F.3d at 1105-06 & nn. 24-31 (Kravitch, J., dissenting). These record facts are highly probative of the issues of whether respondents' policy has the primary effect of advancing religion and conveys an actual or apparent state endorsement of the religious messages resulting from the policy.

To the extent that respondents seek to distinguish between facial and as-applied challenges, and assert that as-applied claims have been waived, the record refutes the assertion that petitioners waived such a challenge after making such voluminous filings and obtaining judicial notice of the entirety of the record in *Adler I*. App. 134a-138a; *Adler IV*, 206 F.3d at 1104-06 (Kravitch, J., dissenting). The petitioners specifically objected to the loss of opportunity for certain discovery resulting from the district court's consolidation of the trial with the hearing on petitioners'

application for a preliminary injunction pursuant to Fed.R.Civ.P. 65(a)(2). App. 135a & n.25; *Adler IV*, 206 F.3d at 1105 & n.25 (Kravitch, J., dissenting). Accordingly, the record facts are properly before the Court for consideration.

The issue presented is clearly important and recurring throughout the United States, resulting in a multitude of varying judicial decisions. The Court of Appeals turned a veritable blind eye toward the history, context and results of the respondents' "Graduation Prayers" policy, as well as toward this Court's decision in *Santa Fe*. Accordingly, the Court should grant review in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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